85-1885

No. .....

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1985

GOOD'S FURNITURE HOUSE, INC.,
Petitioner-Appellant,

vs.

IOWA STATE BOARD OF TAX REVIEW,
Respondent-Appellee.

APPEAL FROM THE SUPREME COURT OF IOWA

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

WHETHER THE STATE OF IOWA CAN REQUIRE GOOD'S FURNITURE TO COLLECT IOWA'S USE TAX WHERE GOOD'S FURNITURE MAINTAINS NO OFFICES IN IOWA, ALL CUSTOMERS OF GOOD'S FURNITURE COME TO ILLINOIS TO PURCHASE FURNITURE, GOOD'S FURNITURE DOES NOT SPECIFICALLY DIRECT ANY ADVERTISING TO IOWA RESIDENTS, AND GOOD'S FURNITURE DELIVERS FURNITURE TO IOWA CUSTOMERS IN IOWA.

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CODE OF IOWA (1983):

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OPINIONS BELOW

The opinion of the Supreme Court of Iowa (App., *infra,* 1a-16a) is reported at 382 N.W. 2d 145. The orders of the Iowa District Court for Polk County, the Iowa State Board of Tax Review ("Board"), and the Iowa Department of Revenue ("IDOR") hearing officer (App., *infra,* 19a-36a), are unreported.

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STATEMENT OF JURISDICTION

The opinion of the Supreme Court of Iowa was filed on February 19, 1986. The Supreme Court of Iowa issued its procedendo on March 12, 1986. (App., *infra,* 18a). The jurisdiction of this Court is invoked under 28 U.S.C. 1257.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are set out in a statutory appendix (App., *infra,* 37a-39a).

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STATEMENT OF FACTS

A. Good's Furniture Operations

Good's Furniture is an Illinois corporation which operates a furniture store in Kewanee, Illinois. At its store,

located about 55 miles from the Iowa-Illinois border, Good's Furniture sells furniture, carpet and draperies. All customers come to Good's Furniture's Kewanee store to purchase goods. Good's Furniture has never maintained a warehouse or office in Iowa, has never rented, leased or owned any property in Iowa, and has never maintained any sales people in Iowa.

Since the early 1970's Good's Furniture has used television as its principal advertising medium. Good's Furniture's location in Kewanee is bracketed between the television markets in Peoria, Illinois and the Quad Cities area (Moline and Rock Island, Illinois and Davenport and Bettendorf, Iowa). Good's Furniture does not gear its television advertising to customers in Iowa. One of three network television stations in the Quad City area is located in Davenport, Iowa. Good's Furniture purchases the most economical advertising in each of its markets, and based on price sometimes advertises through the Davenport, Iowa television station.

The furniture sold by Good's Furniture is usually too large for customers to take away themselves. As a result, Good's Furniture delivers virtally all furniture in its own trucks and, within a 60 mile radius of Kewanee, Good's Furniture makes no charge for delivery. This area of free delivery includes Davenport and Bettendorf, Iowa. Good's Furniture's employees transport furniture into Iowa, remove it from Good's Furniture's delivery truck, and place the furniture in the customer's home. Infrequently, Good's Furniture's employees perform assembly work on the furniture that could not be done in Good's Furniture's show room. At times, Good's Furniture's employees performed

minor repairs on the furniture, or collect the customers payment. Good's Furniture could have the same delivery work performed through an independent service.

From April 1, 1977 through March 31, 1982, Good's Furniture sent its delivery truck to the Quad City area about twice a week. Once a week, delivery would be largely to the Illinois side of the Quad City area; the other weekly delivery would be mainly to Davenport and Bettendorf, Iowa. None of the weekly runs delivered furniture exclusively to Iowa. On an occasional and irregular basis, Good's Furniture delivered furniture to areas in Iowa outside of Davenport and Bettendorf. During this period, Good's Furniture delivered furniture to approximately 10 to 12 locations within Iowa each week. Approximately 10% of Good's Furniture's sales were to Iowa residents.

B. Iowa's Assessment of Use Tax

On June 22, 1982 the Iowa Department of Revenue ("IDOR") issued a notice of adjustment and deficiency asserting that Good's Furniture owed use tax for the period April 1, 1977 through March 21, 1982. On June 30, 1982 Good's Furniture paid $38,430.68 to the IDOR representing $27,084.37 of tax, $6,771.09 of penalties and $4,778.49 of interest. On July 19, 1982 Good's Furniture filed a claim for refund with respect to the monies paid. On August 3, 1982 the IDOR denied Good's Furniture's claim for refund. Subsequently, Good's Furniture filed a protest pursuant to Iowa Code § 422.73(1), Code of Iowa (1983).

On June 7, 1983 the matter was heard before a hearing officer appointed by the IDOR. Good's Furniture raised the issue of the constitutionality of Iowa's imposition of use tax collection liability on Good's Furniture be-

fore the hearing officer and at all subsequent levels of review. On September 3, 1983 the hearing officer issued an opinion denying Good's Furniture's claim for refund of the use tax and interest, but allowing Good's Furniture's claim for refund of penalties totalling $6,771.09.

Good's Furniture appealed to the Iowa State Board of Tax Review, and on October 9, 1984 the Board affirmed the hearing officer's order.

On November 7, 1984 Good's Furniture filed a petition for judicial review of final agency action by the Board. On May 17, 1985, the District Court for Polk County affirmed the Board's decision. On June 13, 1985, Good's Furniture filed its notice of appeal to the Supreme Court of Iowa. On February 19, 1986 the Supreme Court of Iowa issued its opinion affirming the decision of the District Court for Polk County.

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ARGUMENT

Many states that impose sales taxes also impose corollary use taxes on tangible property bought out of State to protect sales tax revenues and to subject sales by local retailers and out-of-state retailers to the same tax load.[1]

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[1] Iowa imposes an excise tax on the use in Iowa of tangible personal property purchased for use in Iowa. Section 423.2, Code of Iowa (1983). The excise tax on the use of tangible personal property which is sold by a "retailer maintaining a place of business in Iowa" is generally to be collected by the retailer and remitted to the IDOR. Sections 423.1(6) and 423.6(2), Code of Iowa (1983). If the excise tax is not paid by the retailer, the person using the property in Iowa is required to pay the tax directly to the IDOR. Section 423.6(3), Code of Iowa (1983).

The collection of a use tax is greatly simplified if out-of-state vendors can be compelled to collect and remit the use tax to the taxing state. "However, not every out-of-state seller may constitutionally be made liable for payment of the use tax on merchandise sold to purchasers in the State". *National Geographic Society vs. California Board of Equalization,* 430 U.S. 551, 555 (1977). Before a taxing state can require an out-of-state retailer to collect and remit a use tax, "due process requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." *Miller Brothers Co. v. Maryland,* 347 U.S. 340, 344-5 (1953). This Court has rejected the notion that the retailer's slightest presence within the taxing state independent of any connection through interstate commerce will permit the state to constitutionally impose a duty and liability on the out-of-state seller to collect the use tax. *National Geographic, id.* at 556.

Good's Furniture's operations do not have a sufficient nexus with Iowa to constitutionally justify imposition of Iowa's use tax upon Good's Furniture. Good's Furniture maintains no offices in Iowa. All of Good's Furniture's customers come to Good's Furniture's Illinois store to purchase furniture. Although Good's Furniture's advertising does reach Iowa residents, Good's Furniture does not specifically direct any advertising to Iowa residents. Good's Furniture's deliveries to Iowa customers in interstate commerce is not a sufficient nexus to require Good's Furniture to collect Iowa's use tax. The state courts that have recently ruled on this issue have consistently taken positions which limit the impact of *Miller Brothers* and other

cases decided by this Court to their specific facts. This Court should issue a writ of certiorari to assure that this Court's opinions are not being undermined by the courts of the several states.

In *General Trading Co. v. State Tax Commission of Iowa,* 322 U.S. 335 (1944), the Court considered the application of a predecessor statute upon a retailer who sent traveling salesmen into Iowa to solicit orders. Focusing on the retailer's solicitation of sales by sending salesmen into Iowa, the Court held that Iowa could in that instance constitutionally require the retailer to collect and pay Iowa's use tax. The Court cautioned, however, that "no State can tax the privilege of doing interstate business". 322 U.S. at 338. Unlike *General Trading Co.,* Good's Furniture does not send any salesmen into Iowa to solicit orders. All of Good's Furniture's customers came to Good's Furniture's Kewanee, Illinois store to purchase goods.

In *Miller Brothers Co. v. Maryland,* 347 U.S. 340 (1953), Mr. Justice Jackson articulated the often quoted requirement that for a state to impose a collection obligation on an out-of-state seller there must be "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." Id. at 344-45. In Miller Brothers, a Delaware retailer sold directly to customers at its store in Delaware. Residents of neighboring Maryland would go to Miller Brothers' store to make purchases, and Miller Brothers would at times arrange for delivery into Maryland either by common carrier or in its own truck. Miller Brothers had no resident agent or outlets in Maryland, and did not ad-

vertise in Maryland media, although its advertisements in the Delaware media did make their way into Maryland. This Court held that the Delaware vendor's contacts with Maryland were not sufficient for Maryland to constitutionally impose a use tax obligation on Miller Brothers.[2]

Even though Miller Brothers made deliveries into Maryland, and despite the fact that its Delaware advertisements reached the Maryland market, the Court found that Marylanders went to Delaware to make purchases, Miller Brothers did not go to Maryland to make sales. The Court held that there "was no invasion or exploitation of the consumer market in Maryland". *Miller Broth-*

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[2] The *Miller Brothers* court distinguished *General Trading* as:

> * * * the case of an out-of-state merchant entering the taxing state through traveling sales agents to conduct continuous local solicitation followed by delivery of ordered goods to the customers, the only nonlocal phase of the total sale being acceptance of the order. Probably, except for credit reasons, acceptance was a mere formality, since one hardly incurs the cost of soliciting orders to reject. The Court could properly approve the State's decision to regard such a rivalry with its local merchants as equivalent to being a local merchant. But there is a wide gulf between this type of active and aggressive operation within a taxing state and the occasional delivery of goods sold at an out-of-state store with no solicitation other than the incidental effects of general advertising. Here was no invasion or exploitation of the consumer market in Maryland. On the contrary, these sales resulted from purchasers traveling from Maryland to Delaware to exploit its less tax-burdened selling market. That these inhabitants incurred a liability for the use tax when they used, stored or consumed the goods in Maryland, no one doubts. But the burden of collecting or paying their tax cannot be shifted to a foreign merchant in the absence of some jurisdictional basis not present here.

Id. at 346-7.

ers Co., id. Good's Furniture's contacts with Iowa are analogous and substantially similar to Miller Brothers contacts with Maryland. Good's Furniture does not maintain any resident agents or outlets in Iowa. Good's Furniture's advertising does make its way into Iowa, but is not specifically directed toward Iowa residents. As in *Miller Brothers,* Good's Furniture delivers goods to customers in Iowa through the use of Good's Furniture's own trucks.

The next use tax case to come before the Court was *Scripto, Inc. v. Carson,* 362 U.S. 207 (1960), which involved a Georgia merchandising corporation that had no office, property or agents in the taxing state of Florida. Orders for Scripto's products were solicited in Florida by ten resident "jobbers", who would forward orders to Georgia for shipment of the ordered goods. The court applied the same general standard adopted in *Miller Brothers,* but concluded that based on the facts presented, the requisite minimum connections with Florida were adequately satisfied. Unlike *Scripto,* Good's Furniture does not maintain any resident sales agents in Iowa.

Seven years after *Scripto,* the Court decided *National Bellas Hess, Inc. v. Department of Revenue,* 386 U.S. 753 (1967), in which the state of Illinois sought to impose a use tax collection obligation on a Missouri based mail order house that had no property, outlets or sales representatives in the taxing state. National engaged in neither local deliveries nor local advertising. Its sole contacts with Illinois were via the United States mail or common carrier. Again applying the nexus test adopted in *Miller Brothers,* the Court held that a state could not require

a seller to collect its use tax where the seller's only connection with customers in the state is by common carrier or through the mails. The Court in *National Geographic* expressly rejected the "slightest presence" standard of the California Supreme Court and held that a sufficient nexus existed because of solicitation activities and offices within the state.[3]

Good's Furniture's only contacts with Iowa were the deliveries on Good's Furniture's trucks of furniture sold in Illinois to customer's private homes in Iowa. Accordingly, to impose an obligation on Good's Furniture to collect Iowa's use tax, Iowa must establish the necessary nexus and definite link between Iowa and the transactions which it here seeks to tax. If, as here, Iowa residents travel into Illinois to make purchases and the retailer makes deliveries into Iowa, then notwithstanding the fact that the retailer's advertising may reach Iowa residents,

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[3] The Court stated:

> Our affirmance of the California Supreme Court is not to be understood as implying agreement with that Court's "slightest presence" standard of constitutional nexus. Appellant's maintenance of two offices in the State and solicitation by employees assigned to those offices of advertising copy in the range of $1 million annually, Tr. of Oral Arg. 6, establish a much more substantial presence than the expression "slightest presence" connotes. Our affirmance thus rests upon our conclusion that appellant's maintenance of the two offices in California and activities there adequately establish a relationship or "nexus" between the Society and the State that renders constitutional the obligations imposed upon appellant pursuant to §§ 6203 and 6204. This conclusion is supported by several of our decisions.

National Geographic at 430 U.S. at 556 (footnote omitted).

if the retailer does not intentionally exploit the Iowa market, there is no sufficient contact with Iowa to justify collection of Iowa's use tax from the retailer. *Miller Brothers, supra.* Similarly, if the retailer maintains a mail order house, engaged neither in local deliveries nor local advertising, and delivers goods by United States mail or common carrier, Iowa may not require the retailer to collect Iowa's use tax. *National Bellas Hess, supra.* On the other side of the spectrum is the situation where, unlike here, the retailer maintains 10 Iowa-resident "jobbers" who forword orders from Iowa residents to the retailer in Illinois for shipment of the ordered goods; in this situation, which does not exist here, the requisite minimum contacts with Iowa would be satisfied and Iowa could collect the Iowa use tax. *Scripto, Inc. v. Carson, supra.*

Under the holdings of this Court, Good's Furniture's operations do not have a sufficient nexus with Iowa to constitutionally justify imposition of Iowa's use tax upon furniture from Good's Furniture. While Good's Furniture's advertising does reach some Iowa residents, Good's Furniture does not intentionally direct any advertising to exploit Iowa residents. There is no evidence, for example, that Good's Furniture advertises that Iowa residents will not be subject to Iowa taxes in purchasing goods from Good's Furniture. Good's Furniture's transitory presence in delivery of furniture to private homes in Iowa is not a sufficient nexus to require Good's Furniture to collect Iowa's use tax.

In holding Iowa's imposition of use tax collection liability upon Good's Furniture constitutional, the Supreme Court of Iowa concluded that "recent decisions of the United States Supreme Court have eroded the holding of

Miller Brothers." 382 N.W. 2d 145, 149. The Iowa Supreme Court relied on a growing number of recent state court decisions which have held against the out-of-state seller based on the slightest distinguishing factors from those laid out in this Court's prior decisions. *See, e.g. Rowe-Genereux, Inc. v. Vermont Department of Taxes,* 138 Vt. 130, 137, 411 A.2d 1345, 1349 (1980). ("The facts of the present case split down the middle the distinctions that the Supreme Court has made in *Miller Brothers* and its offspring.") *Cooey-Bentz Co. v. Lindley,* 66 Ohio St. 2d 54, 56, 419 N.E.2d 1087, 1088 (1981) ("Making deliveries, installations and repairs in Ohio with company-owned vehicles, appellant regularly took advantages of this state's police protection, as well as the roads provided by the state for the use of its residents."); *In Re State Sales or Use Tax Liability of Webber Furniture,* 290 N.W. 2d 865, 869 (S.D. 1980) ("As long as appellant chooses to do business in this state, as evidenced by the regular presence of its merchandise haulers and employees delivering purchases to South Dakota residents, there is a sufficient nexus between the state and appellant to constitutionally support the imposition of use tax collection responsibility upon appellant.").

The Supreme Court of Iowa's decision in this case conflicts with this Court's decision in *Miller Brothers* and its progeny. Petitioner respectfully requests this Court to issue a writ of certiorari to the Supreme Court of Iowa.

Dated: May, 1986

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT OF IOWA

GOOD'S FURNITURE HOUSE, INC.,

Appellant,

vs.

IOWA STATE BOARD OF TAX REVIEW,

Appellee.

(Filed February 19, 1986)

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85-827

Appeal from the Iowa District Court for Polk County, Harry Perkins, Judge.

Appeal from judicial review decision upholding determination that Illinois furniture retailer must collect use tax on sales to Iowa customers. AFFIRMED.

Terry C. Hancock and Sheila K. Tipton of Bradshaw, Fowler, Proctor & Fairgrave, Des Moines, and David L. Higgs and Dean B. Rhoads of Sutkowski & Washkuhn Associates, Peoria, Illinois, for appellant.

Thomas J. Miller, Attorney General, Harry M. Griger, Special Assistant Attorney General, and Marcia Mason, Assistant Attorney General, for appellee.

Considered by Reynoldson, C.J., and Harris, McGiverin, Schultz, and Wolle, JJ.

WOLLE, J.

The Iowa use tax statute which we here construe obligates certain retailers to collect from their customers the

tax owed to the Iowa Department of Revenue (department) on sales of tangible personal property used in Iowa. Iowa Code § 423.9 (1983) (all references are to the 1983 Iowa Code). The definitional section of the statute describes activities which obligate retailers to collect use tax. Iowa Code §§ 423.1(5), (6) (defining "[r]etailer" and "[r]etailer maintaining a place of business in this state"). Petitioner Good's Furniture House, Inc. (Good's Furniture), an Illinois retailer, appeals from an adverse judicial review determination upholding a use tax assessment covering the period April 1, 1977, through March 31, 1982. Good's Furniture maintains that the use tax statute does not reach its operations, that the statute violates due process if it does, and that the department should be estopped from collecting the tax. We find no merit in these arguments and affirm.

I. *Background Facts and Proceedings.*

Good's Furniture is an Illinois corporation with its principal place of business at its retail store in Kewanee, Illinois, which is located about fifty-five miles east of the Iowa-Illinois border. At its store Good's Furniture sells furniture, carpet and draperies. During the assessment period in question, about ten percent of its retail sales were to Iowa residents. Good's Furniture regularly solicited customers through intensive television advertising on stations broadcasting into Iowa.

The volume of sales to Iowa residents enabled Good's Furniture to provide free regular delivery service in its own trucks to customers residing in the Iowa cities of Davenport and Bettendorf. Its employees made regular

but less frequent truck deliveries to Iowa customers residing outside those cities. Each week Good's Furniture trucks delivered merchandise at ten to twelve Iowa locations. The employees making those regular deliveries into Iowa placed the merchandise in Iowa homes, assembled some items, and on occasion repaired minor defects in the delivered goods.

The department found that those activities in Iowa warranted assessment of use tax against Good's Furniture covering the five year period in question. The department also denied a claim for refund which Good's Furniture filed after paying the tax under protest. A contested case evidentiary hearing yielded a final agency decision of the Iowa State Board of Tax Review upholding denial of the claim for refund. The district court on judicial review affirmed.

Good's Furniture has steadfastly challenged the department's assessment of use tax on three grounds. It contends: (1) it was not a retailer maintaining a place of business in Iowa within the meaning of the Iowa use tax statute; (2) the assessment of use tax under the statute violated its constitutional right to due process; and (3) the department should be estopped from assessing use tax because department representatives earlier informed it that Iowa use tax need not be collected.

Our function in this judicial review proceeding is to determine whether the final agency decision violated statutory or constitutional provisions or in some other respect must be overturned on a ground provided for in the Iowa Administrative Procedure Act, Iowa Code section 17A.19

(8). *See Kartridg Pak Co. v. Department of Revenue*, 362 N.W.2d 557, 559 (Iowa 1985).

I. *Statutory Authority to Assess Use Tax.*

We first must examine the interconnected wording of several sections of the use tax statute to determine whether the department could require Good's Furniture to collect and pay the tax owed by its Iowa customers. Section 423.9 imposes the duty to collect and remit the tax on retailers who maintain a place of business in Iowa, and one definitional subparagraph extends the obligation to a retailer who has "any agent operating within this state under the authority of the retailer." Iowa Code § 423.1(6) (defining "[r]etailer maintaining a place of business in this state"). The critical definition of "retailer" is found in Iowa Code section 423.1(5):

> "*Retailer*" means and includes every person engaged in the business of selling tangible personal property for use within the meaning of this chapter; provided, however, that when in the opinion of the director it is necessary for the efficient administration of this chapter to regard any salesman, representatives, truckers, peddlers, or canvassers as the agents of the dealers, distributors, supervisors, employers, or persons under whom they operate or from whom they obtain the tangible personal property sold by them, irrespective of whether they are making sales on their own behalf or on behalf of such dealers, distributors, supervisors, employers, or persons, the director may so regard them and may regard the dealers, distributors, supervisors, employers, or persons as retailers for purposes of this chapter.

(Emphasis in original.)

Good's Furniture contends that it was not a "retailer" as defined in that definitional subparagraph because its employees delivering merchandise by truck were not salespersons and made no sales. It reads the phrase "irrespective of whether they are making sales on their own behalf or on behalf of [other persons]" to mean that the employees in Iowa must at a minimum be persons "making sales" to qualify them as agents of a retailer. We find that reading of the statutory language is too narrow. First, it does not accommodate the specific reference to "truckers" as persons who may be deemed agents. Secondly, it ignores the fact that the phrase "property sold by them" is stated in the alternative to the phrase "under whom they operate," indicating that a person may be an agent without being a seller of merchandise.

The department's interpretation of section 423.1(5), in contrast, is sound because it takes into account the inclusion of the word "truckers" which describes an agent without a sales function. The department reads the "irrespective" phrase broadly to eliminate any requirement that the agent make sales, whether the agent be "any salesman, representatives, truckers, peddlers, or canvassers." Iowa Code § 423.1(5).

The meaning of this statute is a question of law, but we give deference and appropriate weight to the agency's interpretation. *Ballstadt v. Iowa Department of Revenue,* 368 N.W.2d 147, 148 (Iowa 1985); *American Home Products Corp. v. Iowa State Board of Tax Review,* 302 N.W.2d 140, 142 (Iowa 1981); *Schmitt v. Iowa Department of Social Services,* 263 N.W.2d 739, 745 (Iowa 1978); Iowa Code § 4.6(6). In construing statutes we seek to give effect to

the entire statute. Iowa Code § 4.4(2). Moreover, it is appropriate for us to focus on the precise wording of this statutory definition. "The use of the words is the prerogative of the legislature." *State Tax Commission v. General Trading Co.*, 233 Iowa 877, 881, 10 N.W.2d 659, 661 (1943), *aff'd*, 322 U.S. 335 (1944) (construing language of statutory predecessor to Iowa Code § 423.1(6)). Only the department's interpretation gives sensible effect to all 124 words in this one-sentence statutory definition and accommodates the inclusion of "truckers" as non-selling agents of a retail concern.

The department's interpretation also serves the overall purpose of the use tax statute, explained as follows in *Dain Manufacturing Co. v. Iowa State Tax Commission*, 237 Iowa 531, 534, 22 N.W.2d 786, 788 (1946):

> The purpose of the use-tax law is indirectly to tax sales that cannot be directly taxed under the Iowa sales-tax law. Since sales of property designed for use in Iowa cannot be taxed if consummated outside the state, our legislature has resorted to the plan (not uncommon in recent years) of taxing the use of such property in the state. The tax is on the use but it presupposes a prior sale. The tax serves the double purpose of producing revenue that otherwise might not be available and of furnishing some measure of protection to Iowa dealers from competition with outside vendors not subject to liability for sales tax.

It is apparent that the legislature intended non-selling truckers delivering goods into Iowa to be agents of persons by whom they are employed, in order that out-of-state merchandisers would not have an unfair competitve edge over Iowa retailers who must collect sales and use tax. *See* Iowa Code § 4.6(1) (legislative purpose may be considered in determining meaning of statute).

Our construction of the Iowa use tax statute is consistent with a recent decision of the South Dakota Supreme Court which, on very similar facts, construed nearly identical statutory language contained in that state's use tax statute. In the case of *In re State Sales or Use Tax Liability of Webber Furniture*, 290 N.W.2d 865 (S.D. 1980), the court held that a Nebraska furniture seller was a "retailer" because its employees trucked furniture to South Dakota customers. That court said:

> It is apparent that if the legislature intended to restrict the scope of SDCL 10-46-1(6) [the statutory equivalent of Iowa Code § 423.1(5) (1983)] to persons who solicit sales, truckers would have been excluded from the list of those persons who may be regarded as agents for purposes of this chapter. Furthermore, SDCL 10-46-1(6) includes the phrase, "under whom they operate," which is separable and distinct from that portion of the statute regarding sales made by other persons enumerated therein. The sale of merchandise by appellant to South Dakota residents which is trucked into the state by Webber's employees is within the use tax collection and remittance statutes; therefore, the state may require appellant to collect a use tax on such sales and remit the same to the Department of Revenue.

Id. at 868. We reach the same conclusion on similar reasoning.

The department and the district court on judicial review correctly determined that Good's Furniture was obligated by Iowa statute to collect and remit use tax on its sales of merchandise for use in Iowa.

II. *Due Process.*

Good's Furniture also contends that it had insufficient contacts with Iowa to provide the nexus which must

be present before an excise tax satisfies the due process requirements of the fourteenth amendment to the United States Constitution.

Good's Furniture relies primarily on *Miller Brothers Co. v. Maryland,* 347 U.S. 340, 74 S. Ct. 535, 98 L.Ed. 744 (1954), in which the Court found that Maryland had insufficient connection with a Delaware furniture retailer to impose its use tax without violating due process. In that case the Delaware retailer had no offices, salesmen, or employees in Maryland except for intermittent occasions when its employees delivered merchandise into Maryland. Some of the merchandise sold to Maryland customers was delivered by common carrier. There was little evidence that the Delaware retailer directly solicited Maryland customers. The Court explained that to satisfy due process there must be "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." 347 U.S. at 44-45, 74 S. Ct. at 539, 98 L. Ed. at 748.

More recent decisions of the United States Supreme Court have eroded the holding of *Miller Brothers.* In *Scripto, Inc. v. Carson,* 362 U.S. 207, 80 S. Ct. 619, 4 L. Ed. 2d 660 (1960), a Georgia merchandising corporation solicited orders in Florida through the use of ten resident "jobbers." Scripto, Inc. had no offices, property or full-time employees in Florida, but the jobbers would forward orders to Georgia for shipment of the goods. The court applied the nexus test adopted in *Miller Brothers,* but held that the requisite minimum contacts with Florida were sufficient to justify imposition of use tax liability even though the jobbers were independent contractors.

The next case in the series, *National Bellas Hess, Inc. v. Department of Revenue,* 386 U.S. 753, 87 S. Ct. 1389, 18 L. Ed. 2d 505 (1967), involved an Illinois Ruling imposing a use tax obligation on a Missouri-based mail order house whose sole contacts with Illinois were by mail or common carrier. The court again applied the *Miller Brothers* nexus test and held that a state could not constitutionally require a seller to collect use tax where the seller had no connection with the taxing state's customers apart from use of the mail or common carriers.

In a more recent Supreme Court decision addressing this issue, *National Geographic Society v. California Board of Equalization,* 430 U.S. 551, 97 S. Ct. 1386, 51 L. Ed. 2d 631 (1977), California required the society to collect use tax owed by its customers who purchased maps, atlases, globes and books though (sic) its interstate mail order business. The Society did maintain two offices in the state, but the activities of those offices were unrelated to its mail order business. California contended that the seller's activities within the state, although unrelated to the sales transactions, were sufficient to require imposition of the tax imposed by reason of the mail order sales. The Supreme Court agreed and explained:

> [T]he relevant constitutional test to establish the requisite nexus for requiring an out-of-state seller to collect and pay the use tax is not whether the duty to collect the use tax relates to the seller's activities carried on within the State, but simply whether the facts demonstrate "some definite link, some minimum connection, between [the state and] the *person* . . . it seeks to tax."

430 U.S. at 561, 97 S. Ct. at 1393, 51 L. Ed. 2d at 640 (emphasis in the original) (citations omitted) (quoting *Miller*

Brothers, 347 U.S. at 34-35, 74 S. Ct. at 539, 98 L. Ed. at 748).

We conclude that the *Miller Brothers* nexus test, as refined by these later Supreme Court cases, was satisfied by the department's showing that Good's Furniture directly solicited a large volume of Iowa sales by intensive television advertising, then regularly serviced its Iowa customers by delivering merchandise in its own trucks with its own employees.

Other state court decisions are in accord with our conclusion on this due process issue. In a case involving the Vermont use tax applied to a New Hampshire furniture and carpet seller with interstate business similar to that of Good's Furniture, the Vermont Supreme Court rejected a due process challenge after carefully parsing United States Supreme Court decisions and summarizing their holdings as follows:

> First, it seems clear that the nexus requirement for sales taxes and use taxes is different, and that a lesser nature or extent of corrections will pass constitutional muster in the latter case. Second, the "presence" of the out-of-state seller within the taxing state must be more than occasional deliveries by company truck as in *Miller Brothers,* but perhaps less than the degree of "presence" established by ten jobbers soliciting orders within the state in *Scripto.* Third, the requisite nexus can be found in the case of a mail order seller with retail outlets, solicitors or property within the taxing state as in *National Geographic,* but cannot be found where the out-of-state seller merely communicates with customers in the taxing state by mail or common carrier as in *National Bellas Hess.*

Rowe-Genereux, Inc. v. Vermont Department of Taxes, 138 Vt. 130, 137, 411 A.2d 1345, 1349 (1980). Use tax

statutes have also survived due process challenges in relatively recent Ohio and South Dakota cases. *Cooey-Bentz Co. v. Lindley,* 66 Ohio St. 2d 54, 56, 419 N.E.2d 1087, 1088 (1981) ("Making deliveries, installations, and repairs in Ohio with company-owned vehicles, appellant regularly took advantages of this state's police protection, as well as the roads provided by the state for the use of its residents."); *In re States Sales or Use Tax Liability of Webber Furniture,* 290 N.W.2d 865, 869 (S.D. 1980) ("As long as appellant chooses to do business in this state, as evidenced by the regular presence of its merchandise haulers and employees delivering purchases to South Dakota residents, there is a sufficient nexus between the state and appellant to constitutionally support the imposition of use tax collection responsibility upon appellant.").

Good's Furniture had sufficient Iowa contacts to allow the department to impose upon it the requirements of Iowa's use tax statute without violating constitutional due process requirements.

III. *Estoppel.*

Good's Furniture bases its estoppel theory on conversations with department employees which allegedly took place both before and after the audit period in question. Good's Furniture presented testimony that it collected use tax for about a year, then in 1972 had its accountant phone to inquire of the department whether an out-of-state seller delivering merchandise into Iowa homes was required to collect the tax. The accountant apparently was told by someone named Pierson or Peterson that it need not collect the tax, and thereafter it discontinued collecting Iowa use tax. Good's Furniture also relies on a sim-

ilar conversation its managing officer had with an unidentified department representative after the department had commenced its audit sometime in 1982.

The hearing officer's findings, adopted in the final agency decision, disclose at best a cloudy picture of just what took place in those phone conversations. The final agency decision included the following findings of fact on the estoppel issue:

> [E]arly in December, 1972, an employee of the CPA firm, spoke with an H. L. "Pierson" or "Peterson," and that individual informed the employee that no Iowa use tax was due from the Protestor since the Protestor merely delivered goods into Iowa and did not solicit sales through agents or maintain a store there. The position which Mr. "Pierson" or "Peterson" held with the Department is unknown. Also, the testimony does not reveal how many weekly deliveries the Protestor was making in Iowa in late 1972 and whether the CPA firm's employee mentioned that number to the Department employee.

Both the agency and the district court on judicial review concluded from those record-supported facts that Good's Furniture had not sustained its burden to prove estoppel, and we agree with that conclusion.

The agency properly placed on Good's Furniture the burden to establish with strict proof each element of estoppel. *Paveglio v. Firestone Tire & Rubber Co.*, 167 N.W. 2d 636, 639 (Iowa 1969). Because the agency as fact finder determined that Good's Furniture had not met its burden of proof, we will not interfere with that determination unless estoppel was established as a matter of law. *Heidemann v. Sweitzer*, 375 N.W.2d 665, 670 (Iowa 1985); *Pohlman v. Ertl Co.*, 374 N.W.2d 253, 255 (Iowa 1985). The

evidence in this record falls far short of proving all elements of estoppel as a matter of law.

Our court has addressed estoppel in two relatively recent cases involving tax collection. *Iowa Movers & Warehouseman's Association v. Briggs,* 237 N.W.2d 759, 764 (Iowa), *cert. denied,* 429 U.S. 832 (1976); *S & M Finance Co. Fort Dodge v. Iowa State Tax Commission,* 162 N.W.2d 505 (Iowa 1969). In neither case did we decide whether estoppel can be invoked against the state when the collection of revenue is involved, although we noted that other courts are split on the question. *Iowa Movers,* 237 N.W.2d at 765; *S & M Finance Co.,* 162 N.W. 2d at 510. It is clear, however, that a person relying on a representation by a state employee to establish estoppel must at a minimum prove that the employee had authority and sufficient relevant factual information to make a meaningful representation binding on the state. *S & M Finance Co.,* 162 N.W.2d at 511 ("The record neither shows the nature of [the state employee's] work nor the extent of his authority. Without such showing plaintiff completely fails to establish an estoppel.").

Good's Furniture has not established as a matter of law that it had a right to rely upon any of the alleged statements it attributes to department employees. It has not shown that department employees in 1972 fully understood the facts pertinent to the audit period here in question, nor that they were authorized to speak for the department in answering the accountant's question concerning the obligation of Good's Furniture to collect use tax then or in the future.

Like the district court, we uphold the final agency determination that Good's Furniture was properly required

to collect and remit use tax owed by its Iowa customers during the period covered by the department's audit. The claim for refund of use taxes paid is without merit.

AFFIRMED.

APPENDIX B

IN THE SUPREME COURT OF IOWA

No. 85-827

Iowa District Court for Polk County No. AA 711

PROCEDENDO

GOOD'S FURNITURE HOUSE, INC.,

Petitioner-appellant,

vs.

IOWA STATE BOARD OF TAX REVIEW

Respondent-appellee.

To the Iowa District Court for Polk County:

Whereas, there was an appeal from the district court judgment in the above-captioned case to the supreme court and on the 19th day of February, 1986, the supreme court affirmed the judgment of the district court.

Therefore, you are hereby directed to proceed with diligence and according to law in the same manner as if there had been no appeal.

In witness whereof, I have hereunto set my hand and affixed the seal of the supreme court.

Done at Des Moines this 12th day of March, 1986.

/s/ R. K. Richardson
Clerk of the Supreme Court

APPENDIX C

IN THE DISTRICT COURT FOR POLK COUNTY

AA-711

GOODS FURNITURE HOUSE, INC.,

Petitioner,

-vs-

STATE OF IOWA, STATE BOARD OF TAX REVIEW,

Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW and RULING

STATEMENT

This matter is before the Court upon the petition of Goods Furniture House, Inc., seeking Judicial Review of an adverse decision by the respondent, Iowa State Board of Tax Review. The petitioner appeared by its attorneys, Terry C. Hancock and Dean B. Rhoads. The respondent appeared by its attorney, Harry M. Griger. The Court, after examining the entire record and considering the arguments of counsel, makes the following Findings of Fact, Conclusions of Law and Ruling.

FINDINGS OF FACT

The Court finds that:

1. It has jurisdiction over the subject matter of this action and over the parties hereto. This is an application for Judicial Review of final agency action after the exhaustion of all administrative remedies.

2. The factual background of the case is not in serious dispute. Counsel for the parties substantially agreed the facts are as presented in petitioner's brief (pages 3 to 6) and the Court, by this reference, adopts those facts as a part of these findings.

3. The issues, as summarized, are:

A. Whether the Board erred in finding that Good's is a retailer maintaining a place of business in the State of Iowa within the meaning of Section 423.1(6) of the Code of Iowa (1983).

B. Whether the Board erred in determining that Iowa's requirement that Good's collect use tax on sales to Iowa customers does not violate Good's right to due process under the Fourteenth Amendment of the United States Constitution.

C. Whether the Board erred in finding that the Department of Revenue was not estopped from assessing use tax against Good's.

Considering them in that order, the Court concludes and finds:

A. The decision of the respondent, Iowa State Board of Tax Review deciding that Good's Furniture House, Inc., was a retailer maintaining a place of business in the State of Iowa was correct and is supported by both the facts and the law. The petitioner's employees making regular deliveries into Iowa delivering furniture in the petitioner's trucks; placing the furniture in Iowa homes; assembling some items, and on occasion repairing minor defects, constitutes in the broad sense "maintaining a place of busi-

ness in the state." The Court, in so ruling, adopts the reasoning of the South Dakota Supreme Court *In the Matter of State Sales or Use Tax Liability of Webber Furniture, Scottsbluff, Nebraska,* 290 N.W. 2nd 865 (S.D. 1980) where a similar statute was applied to similar facts.

B. The agency decided that Good's Furniture House, Inc. has sufficient contacts with the State of Iowa so as to satisfy the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. This Court concludes that under the undisputed facts this was a correct decision. In reaching this conclusion the Court relies heavily upon the reasons and arguments set forth in respondent's brief (pages 9 to 21). The Rowe, Webber and Cooey cases cited therein afford a well-reasoned and logical basis for requiring Good's Furniture to collect the Iowa use tax from Iowa customers. To do so does not, under this factual situation, deprive the petitioner of due process.

C. The claim of equitable estoppel based upon some person or persons answering the telephone at the Iowa Department of Revenue and giving a verbal opinion that petitioner was not obligated to collect the use tax was rejected by the agency. This Court concurs in that decision. The Case of S&M Finance Company Fort Dodge vs. Iowa State Tax Commission, 162 N.W. 2d 505 (Iowa 1968) appears in point. While the Court indicated in that opinion that it was not deciding under what circumstances equitable estoppel might be exercised against the state in tax matters, the opinion considered in its entirety leaves little doubt that the facts in this case fall far short of creating a situation where the state should be estopped from requiring payment of a tax due and unpaid.

CONCLUSIONS OF LAW

The Court in exercising its power to review an agency decision is not permitted to substitute its opinion for that of the agency if there is substantial evidence to support the agency decision. Here the agency's interpretation of the statute, its interpretation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution and its interpretation of the applicability of the concept of equitable estoppel under this factual situation is neither unreasonable, arbitrary nor capricious. The Court concludes there is no error of law and that the decision of the agency is supported by substantial evidence.

RULING

It is therefore the ruling of the Court that the petition of Good's Furniture House, Inc. should be and it is hereby dismissed. The decision of the respondent Iowa State Board of Tax Review should be and it is hereby affirmed. Costs of this action are taxed to the petitioner.

Dated at Des Moines, Iowa, this 17th day of May, 1985.

/s/ Harry Perkins
Judge

Copy to:

Terry C. Hancock, Esq.
Dean B. Rhoads, Esq.
Harry M. Griger, Esq.

APPENDIX D

BEFORE THE IOWA STATE BOARD
OF TAX REVIEW
HOOVER STATE OFFICE BUILDING
DES MOINES, IOWA

IN THE MATTER OF

GOODS FURNITURE HOUSE, INC.
204 North Main Street
Kewanee, Illinois 61443

USE TAX REFUND CLAIM

FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

DOCKET NO. 463

This matter came on for hearing before the Iowa State Board of Tax Review on February 3, 1984. Appearing on behalf of the Petitioner-Appellant was Mr. Terry C. Hancock, Attorney at Law. Appearing on behalf of the Respondents-Appellees was Mr. Harry M. Griger, Special Assistant Attorney General. All members of the Iowa State Board of Tax Review were present, they being Steven H. Jacobs, Chairman, Richard G. Peebler, Member and Philip F. Miller, Member.

The Board, after having reviewed the record certified by the Appellees, having considered the evidence presented by both parties, the arguments submitted, and being otherwise fully advised in the premises, does hereby enter the following findings of fact, conclusion of law and order.

FINDING OF FACT

That this is an appeal by Goods Furniture House, Inc. from a Proposed Order of the Iowa Department of Revenue dated September 9, 1983 with Darwin D. Clupper acting as hearing officer. There was apparently no appeal to the Director of Revenue and said order became final by passage of time and subsequently appealable to this Board. In brief summary, an assessment was made for Iowa use tax against the Protestor as a retailer maintaining a place of business in this state. Protestor paid the tax, interest and penalties assessed and filed a claim for refund generating the protest here involved. There appear to be three primary arguments involved: (1) A due process argument concerning the assessment, (2) Protestor's argument that it is not a retailer maintaining a place of business within the state, and (3) That the State of Iowa is estopped from collecting said tax due to actions on the part of its employees.

This Board would adopt in its entirety the Statement of the Case and Findings of Fact set out in the Hearing Officer's Proposed Order as if set forth fully herein.

CONCLUSIONS OF LAW

This Board adopts the Conclusions of Law set forth in the Hearing Officer's Proposed Decision as if set forth fully herein. This Board further would adopt the reasoning set out in a brief, in the form of a letter, submitted to this body dated February 6, 1984, by Harry M. Griger, Special Assistant Attorney General. This Board is affirming the opinion that the legislative intent of the Iowa use tax was to protect Iowa retailers by placing their sales

upon an equal tax equality with those of their non-Iowa competitors. The authority set forth in the above mentioned brief is also adopted herein.

CONCLUSION

By adoption of the above Proposed Order and arguments set forth in the above mentioned brief, this Board has effectively disposed of two of the three contentions of Appellant. To some extent, the third primary argument of Appellant concerning constitutionality remains at issue.

This Board is only empowered to rule on the constitutional application of a law. To the extent Appellant's argument concerns the application of the statutes and departmental rules involved, this Board has upheld the Hearing Officer below in deciding they were constitutionally (sic) applied. To the extent that Appellant may be arguing that the law in itself may be unconstitutional, this Board of course will defer. See *Salisbury Laboratories v. Iowa Department of Environmental Qualities,* 276 NW2d 830 (Iowa 1979).

ORDER

IT IS THEREFORE ORDERED, by the Iowa State Board of Tax Review, all members being present and concurring, that the Proposed Order of the Hearing Officer, dated September 9, 1983, be upheld in all regards and same is hereby affirmed.

Issued at Des Moines, Iowa, this 9th day of October, 1984.

IOWA STATE BOARD OF
TAX REVIEW

/s/ By Steven H. Jacobs
Chairman

APPENDIX E

BEFORE THE IOWA STATE DEPARTMENT
OF REVENUE
HOOVER STATE OFFICE BUILDING
DES MOINES, IOWA

DOCKET NO. 82-235-6B-RC

IN THE MATTER OF

GOODS FURNITURE HOUSE, INC.
204 North Main Street
Kewanee, Illinois 61443

USE TAX REFUND CLAIM

ORDER

Pursuant to a Notice of Time, Place and Nature of Hearing, the above entitled matter came on for hearing before the undersigned on June 7, 1983, at 1:00 p.m. Present on behalf of the Iowa Department of Revenue (hereinafter referred to as "Department") was Mark R. Schuling, Assistant Attorney General. Present on behalf of Goods Furniture House, Inc. (hereinafter referred to as "Protestor") was Terry Hancock, Attorney at Law. Phillip Good testified on the Protestor's behalf. The Protestor's exhibits 1 through 5 were admitted into evidence. The Department's exhibit A was also admitted into evidence. Subsequent to the hearing, briefs were filed. The parties courteously allowed the Officer an extended period of time in which to write an Order in this matter.

STATEMENT OF THE CASE

1. The Department, in a notice of adjustment and deficiency, dated June 22, 1982, alleged that use tax was due and owing from the Protestor for the period of April

1, 1977, through March 21, 1982. On June 30, 1982, the Protestor paid $38,430.68 to the Department. On July 19, 1982, the Protestor filed a claim for refund with respect to the amount paid. On August 3, 1982, a representative of the Department denied the Protestor's claim for refund.

2. Pursuant to Iowa Code § 422.73(1) (1983), the Protestor filed a protest alleging that the refusal to refund was improper. The record does not indicate the Tax Review Committee's disposition, if any, of this matter. Subsequently, the Department filed its Answer to the protest, and the matter was set down for hearing.

FINDINGS OF FACT

1. On December 1, 1982, a Notice of Time, Place and Nature of Hearing was sent by certified mail to the parties by the Hearings Division of the Department scheduling an evidentiary hearing for June 7, 1983, at 1:00 p.m. in Conference Room 2, Fourth Floor, Hoover State Office Building, East 13th and Walnut, Des Moines, Iowa. The notice was mailed to the parties at their last known addresses as indicated by the records of the Department and as required by Iowa Code § 17A.12 (1983) and Department rule 730-7.14 (17A) IAC.

2. The Protestor is an Illinois corporation. Goods Furniture House has been a family business since 1895. The Protestor's furniture sales store is located in Kewanee, Illinois, about 55 miles from the Iowa-Illinois border. At the Kewanee store, the Protestor sells medium to higher priced furniture. It does not sell appliances but has a carpet and drape department. Almost all furniture sold by the Protestor is delivered in the Protestor's trucks

to its customers. The pieces sold are usually too large for the customers to take away themselves in their own vehicles. Within a sixty mile radius of Kewanee, the Protestor makes no charge for delivery. Its area of free delivery includes Davenport and Bettendorf, Iowa. During the period of the assessment (April 1, 1977 to March 31, 1982), the Protestor sent its delivery truck to the Quad Cities area about twice a week. Once a week, delivery would be mainly to the Illinois area of the Quad Cities; the other weekly delivery would be mainly to Davenport and Bettendorf. None of the weekly runs delivered furniture exclusively to Iowa. On a very occasional and irregular basis, the Protestor delivered furniture to areas in Iowa outside of Davenport and Bettendorf. During the period of the assessment, approximately ten percent of the Protestor's sales were to Iowa residents, and, per week, the Protestor delivered furniture at ten to twelve locations within Iowa.

3. All the Protestor's delivery into Iowa is performed by its employees. The Protestor does not deliver to Iowa, or anywhere else, by common carrier. The Protestor's employees transport the furniture into Iowa, remove it from the Protestor's delivery truck and place it in the home. Very seldom, the persons delivering the furniture do some assembly work that cannot be done in the Protestor's showroom. They may also perform very minor repairs on the furniture. The persons delivering also collect the customers' payments if delivery is C.O.D. and pick up any furniture previously delivered that a customer wants to return. The Protestor now and during the period of the audit maintained no warehouse or office in Iowa, did not rent, lease or own any property in Iowa,

and had no sales people in Iowa. The only persons sent into Iowa were delivery people, the only property sent into Iowa was the Protestor's delivery trucks.

4. Iowa residents have not always provided the Protestor so much business. During 1970, for instance, there were only two to three purchases per month by Iowa customers of the Protestor's goods. However, in late 1970 or early 1971, the Protestor began to use television advertising. Apparently, prior to this, most of its advertising had been through newspapers and radio. Currently, approximately 95 percent of the Protestor's advertising is television advertising. The record does not indicate how substantial the percentage of the Protestor's Iowa customers was in 1972 compared to the percentage of the Protestor's Iowa customers during the audit period.

5. Now, and during the period of the assessment, the Protestor's advertisements have been seen everyday on television stations in the Quad Cities area. There are three television stations in this area, two on the Illinois side of the Mississippi River and one on the Iowa side. The use of television allows the Protestor to advertise to the maximum number of people for a minimal cost. The television advertising made more Iowa residents aware of the Protestor's store in Kewanee, and by 1972, substantial numbers of Iowa residents were purchasing furniture at the Protestor's store in Kewanee, and the Protestor was making a substantial number of deliveries of furniture to those Iowa customers.

6. In the very early 1970's, as the Protestor began to sell more furniture to Iowa customers, Mr. Good's father began to be concerned concerning whether or not

the Protestor owed any Iowa excise tax upon those sales. The Protestor's firm of certified public accountants was contacted, that firm secured an Iowa use tax permit, and for a time the Protestor collected Iowa use tax. Previous to securing the permit, the Protestor collected a five percent Illinois sales tax from all purchasers. However, early in December 1972, an employee of the CPA firm spoke with an H. L. "Pierson" or "Peterson," and that individual informed the employee that no Iowa use tax was due from the Protestor since the Protestor merely delivered goods into Iowa and did not solicit sales through agents or maintain a store there. The position which Mr. "Pierson" or "Peterson" held with the Department is unknown. Also, the testimony does not reveal how many weekly deliveries the Protestor was making in Iowa in late 1972 and whether the CPA firm's employees mentioned that number to the Department employee. The Protestor was then advised by its CPA firm that it was not obligated to collect Iowa use tax, and the Protestor did not do so during the period of the assessment.

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CONCLUSIONS OF LAW

1. The Department has jurisdiction of this matter pursuant to Iowa Code § 422.73(1) (1983).

2. Four issues are presented for resolution. The first issue concerns the question of whether or not the Protestor is a "retailer maintaining a place of business in this state." If so, the Protestor is obligated to collect sales tax from its Iowa customers, see Iowa Code § 423.9

(1983). Chapter 423.1(6) contains the applicable definition, which reads as follows:

> (6) *"Retailer maintaining a place of business in this state"* or any like term, shall mean and include any retailer having or maintaining within this state, directly or by a subsidiary, an office, distribution house, sales house, warehouse, or other place of business, *or any agent operating within this state under the authority of the retailer or its subsidiary, irrespective of whether such place of business or agent is located here permanently or temporarily,* or whether such retailer or subsidiary is admitted to do business within this state pursuant to Ch. 494. (first italics original, second italics added).

The Protestor's employees delivered furniture into Iowa once a week, making eight to ten stops. They are certainly "employees" operating temporarily within Iowa under the Protestor's authority. As such, if they are also "agents" their activities bring the Protestor within the statute's definition of a "retailer maintaining a place of business within this state," and thus, under § 423.9, their activities obligate the Protestor to collect use tax from the Iowa customers to whom the furniture is delivered.

3. For the law's purpose, the terms "employer" and "employee" are sometimes synonymous with the terms "principal" and "agent." At other times, "agent" has been held to have a more restricted meaning, an "agent" being ony an employee or independent contractor who is authorized by his employer or principal to establish contractual relationships between the employer or principal and third parties, 2A C.J.S., *Agency,* § 16. If it was the intent of the legislature that the more general definition of "agents" be applicable to § 423.1(6), then the Protestor is a "retailer maintaining a place of business in this

state." If the more restrictive definition was intended to apply, the Protestor is not such a retailer, since the employees who delivered the goods had no authority to contractually bind the Protestor. Further argument on the matter is foreclosed by the Iowa Supreme Court's decision in *State Tax Comm'n v. General Trading Co.,* 10 N.W.2d 659 (Iowa 1943). In that case, the Supreme Court determined that "solicitors" sent by the taxpayer into Iowa who took orders from Iowa purchasers *subject to acceptance at the taxpayer's store in Minnesota* were "agents" of General Trading Co. The court decided that these solicitors who were without power to contractually bind General Trading Co., were its agents stating:

> The language is sufficient to include defendant within the terms of the statutory definition. We cannot shut our eyes to the words of the statute. The use of the words is the prerogative of the legislature. Our only function is to interpret the words which it has used. The trial court was right in holding that defendant's operations bring it within the letter and the language of the statute.

General Trading Co. at pp. 661. The ancestor of § 423.1(6) which the court interpreted was slighlty, but not materially, different from the statute as it reads today, see *General Trading Co.* at p. 661, fn. 1. The Protestor is a retailer maintaining a place of business within the State of Iowa.

4. The Protestor next argues that the Department's assessment is a violation of its right to due process under the XIVth Amendment of the Federal Constitution. By way of preliminary discussion, constitutionally, a state may require a merchant to collect use tax on its behalf without violation of the merchant's right to due process if the state has given the merchant " 'anything for which

it can ask return' " and if there exists " 'some definite link, some minimum connection, between a state' " and the merchant upon which the state places the burden of collecting the tax, *National Bellas Hess, Inc. v. Department of Revenue,* 87 Sup. Ct. 1389, 1391 (1967). But, what are the things which the state must have done and the link and connections which must exist before a state may require collection? As stated by Justice Jackson in *Miller Bros. Co. v. State of Maryland,* 74 Sup. Ct. 535, 538-39 (1954): "Our decisions are not always clear as to the grounds on which a tax is supported, especially where more than one exists; nor are all of our pronouncements . . . consistent or reconciliable. A few have been specifically overruled, while others no longer fully represent the state of the law."

5. In spite of the confusion, some clear standards have emerged: a definite link or minimum connection allowing the collection requirement exists if the merchant's sales are arranged by local agents. The same link or connection exists and the alleged collection agent is " 'not restores in the collecting state. An insufficient link or connection exists and the alleged collection agent is " 'not receiving benefits . . . for which it (a state) has the power to exact a price' " if the merchant's only connection with its customers within a state is by common carrier or U.S. mail, *National Bellas Hess, Inc.,* at pp. 1391-92. Insufficient connection or linkage for taxation also exists if a merchant maintains no retail outlets within a state and sends no agents there to solicit sales but only advertises generally by way of the mass media to the inhabitants of the state without "especially" directing its advertising to those inhabitants and deliver some purchases to the in-

habitants by common carrier or, from time to time, delivers other purchases to the state's residents in its own vehicles, *Miller Bros. Co. v. State of Maryland,* at p. 537 and 542, fn. 4(5)(c)(2). The United States Supreme Court has not resolved the question of whether a merchant advertising generally within a state, maintaining no local outlets and sending no solicitors into the state but regularly and consistently delivering its goods into the state in its own vehicles may, consistent with due process, be required to collect use tax for the state in which the deliveries occur. This is the Protestor's situation.

6. Two other courts have examined the question of whether furniture dealers in circumstances similar to the Protestor's may constitutionally be required to collect use tax. They have reached differing conclusions. In *Griffin, Inc. v. Tully,* 404 F. Supp. 738, 749 (D.C. Vt. 1975) vac. 97 Sup. Ct. 219 (1976) a federal district court opined, while temporarily enjoining the New York State Tax Commission from requiring a Vermont furniture dealer to collect use tax, that the furniture dealer would prevail on the merits of its due process argument. *In the Matter of State Sales or Use Tax Liability of Webber Furniture, Scottsbluff, Nebraska,* 290 N.W.2d 865 (S.D. 1980) the South Dakota Supreme Court determined that requiring a furniture dealer, whose circumstances were remarkably similar to the Protestor's, to collect use tax from its South Dakota customers involved no violation of due process, *Webber Furniture* at p. 869. It seems to the Officer that the South Dakota court's reasoning is the better. Due process first requires that the taxing state give something for which it can ask return. It is clear from a study of the applicable cases that if the Protestor were sending agents

into the State of Iowa on a weekly basis who solicited orders from ten to twelve customers per week that collection of use tax upon the sales resulting could be constitutionally required. Iowa provides the same protection and services to the persons who deliver the goods as it would to the persons soliciting sales. Thus, if this state can ask "return" for protection of persons regularly and consistently soliciting sales it would seem that it can also ask return for its protection of persons regularly and consistently making deliveries. Additionally, the court's reasoning in *Webber Furniture* at p. 869 explaining the difference between that case and the *Miller Bros.* case is applicable to the Protestor:

> In contrast to *Miller Bros.*, sales by appellant to South Dakota residents, during a period of two and one-half years, aggregated over $130,000. The store appealed directly to South Dakota residents through advertising in the state. In addition, appellant's employees personally delivered the furniture in virtually all instances, rather than utilizing common carriers. Furthermore, appellant has actively sought a South Dakota market through its policy of delivering to the home of the customer without charge. Webber has established a substantial business with South Dakota residents, exploiting that portion of the consumer market near the state border. Finally, appellant's presence in the state has not been occasional as was that found in *Miller Bros.* Rather, there has been a course of conduct in which appellant has regularly effected deliveries in South Dakota by its own delivery trucks. Subsequent United States Supreme Court decisions have distinguished, if not eroded, *Miller Bros.* on the basis that it was the "Lack of certainty that the merchandise sold over the counter to Maryland customers in Delaware was transported to Maryland prior to its use (which) millitated against the

> finding of adequate nexus with respect to those purchases." (citations omitted) . . . Whether *Miller Bros.* can be so easily explained away upon this factual distinction is not for us to say. Suffice it to note that appellant knows which merchandise is destined for use in South Dakota when it agrees to deliver. Hence, to make appellant add on the South Dakota use tax to those sales of merchandise which are to be delivered to South Dakota is only a minimal burden. As long as appellant chooses to do business in this state, as evidenced by the regular presence of its merchandise haulers and employees delivering purchases to South Dakota residents, there is a sufficient nexus between the state and appellant to constitutionally support the imposition of use tax collection responsibility upon appellant.

In summary though little in this area can be free from doubt, the better argument would seem to be that requiring the Protestor to collect the tax does not violate its right to due process.

7. The Protestor next argues that Mr. "Pierson's" or "Peterson's" statements to the Protestor's accounting firm that no tax was due estopped the Department from assessment of use tax. The elements of estoppel, for the purposes of Iowa law, are set out in *Walters v. Walters,* 203 N.W.2d 376, 379 (Iowa 1973). It is not necessary to list those elements because, in the Officer's opinion, the doctrine of estoppel is not applicable to this case. First, "The burden to prove and establish estoppel is on the party asserting it, with strict proof of all the elements being demanded." *Paveglio v. Firestone Tire & Rubber Co.,* 167 N.W.2d 636, 639 (Iowa 1969). Also, the doctrine of estoppel is not generally invoked against the state, particularly when the collection of revenue is involved. *Iowa Movers & Warehousemens Ass'n v. Briggs,* 237 N.W.2d

759, 765 (Iowa 1976). Strict proof of the elements necessary to establish estoppel is not a part of this record. It must be shown that the employee who made the allegedly estopping statement had authority to bind the Department, *S & M Finance Co. of Fort Dodge v. Iowa State Tax Comm'n,* 162 N.W.2d 505, 511 (Iowa 1969). There is nothing in the record to indicate the position which the employee who spoke to the CPA firm had with the Department. Because of this, no proof, let alone strict proof, has been presented that the employee had authority to bind the Department. Additionally, the substance of what the CPA firm's employee said to the Department's employee is not a part of the record. It is therefore not known whether the firm's employee accurately described the Protestor's operations during the assessment period to the Department employee. Especially, it has not been shown that the Department employee was aware of the number and frequency of the trips taken by the Protestor's employees into Iowa. The absence of evidence that the Protestor's operations during the assessment period were accurately described to the Department employee is absence of the "strict proof" necessary to establish estoppel. In conclusion, since suitable evidence to establish estoppel is lacking, there is no relief from the assessment on that ground.

8. The matter of penalty remains. Since this refund claim is, in essence, the payment of an assessment under protest, penalty is an issue in the case. The parties agreed that the issue of penalty could be discussed, even though no mention was made of it in the Notice of Time, Place and Nature of Hearing. The applicable section reads as follows:

> If a person fails to file a monthly deposit form or return with the Department on or before the due date, unless it is shown that the failure was due to reasonable cause, there shall be added to the amount required to be shown as tax on the monthly deposit form or return 5 percent of the amount of the tax if the failure is for not more than one month, with an additional 5 percent for each additional month or fraction of a month during which the failure continues, not exceeding 25 percent in the aggregate.

Iowa Code § 423.18(1) (1983). Was there "reasonable cause" for the Protestor's failure to file the returns and collect the tax during the assessment period? The Officer believes that there was reasonable cause for the failure and little needs to be said to justify this conclusion. It has long been established that if a taxpayer relies upon the representations of an expert that no tax ought to be paid, and the reliance is in a complex or obscure area of tax law, and as a result of that reliance the tax remains unpaid, "reasonable cause" for the failure to pay exists, see *James Phelan, T.C. Memo* 1959-53; *Louis Corneleio,* T.C. Memo 1959-82 and this Hearing Officer's Order *In the Matter of Klug, Inc.,* (docket number 79-118-6B-A), May 30, 1980, at pp. 7 and 8. The Protestor consulted with its accounting firm and relied upon the firm's representation in a complex and obscure area of tax law (especially the matter of due process) that no tax was due. That reliance in that area establishes reasonable cause for the failure to pay the tax.

THEREFORE, in light of the above mentioned facts, law and reasoning, it is reasonable to find that the Department did not err in its refusal to grant a refund of use tax paid. It is reasonable to find that the Department did err in the assessment of penalty against the Protestor.

With respect then to the record developed by the parties, it is the belief of this Hearing Officer that the evidence is more than substantial to support a factual and legal conclusion that the Department's refusal to refund tax was proper and its assessment of penalty improper.

No affidavit has been filed by the Protestor under rule 730-7.9(17A) IAC justifying deletion of any information contained in the record prior to public inspection. The record is thus completely open to public inspection in accordance with Iowa Code § 17A.3(a)(d), 68A.2 and 68A.7, The Code (1983).

Pursuant to Iowa Code § 17A.15(3) (1983), this Hearing Officer's proposed decision becomes the final decision of the Department of Revenue without further proceedings unless there is an appeal to, or review on motion of, the Department within thirty (30) days of its issuance.

Done at Des Moines, Iowa this 9th day of September, 1983.

IOWA DEPARTMENT OF REVENUE

BY /s/ Darwin D. Clupper
Hearing Officer

APPENDIX F

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides

> * * * nor shall any State deprive any person of life, liberty, or propery, without due process of law; * * *

Code of Iowa, § 423.1 (1983) provides:

> *Definitions.* The following words, terms, and phrases when used in this chapter shall have the meanings ascribed to them in this section:
>
> 1. "Use" means and includes the exercise by any person of any right or power over tangible personal property incident to the ownership of that property, except that it shall not include processing, or the sale of that property in the regular course of business. * * *
>
> 2. "Purchase" means any transfer, exchange, or barter, conditional or otherwise, in any manner or by any means whatsoever, for a consideration.
>
> 3. "Purchase price" means the total amount for which tangible personal property is sold, valued in money, whether paid in money or otherwise; provided that cash discounts and trade-in allowances taken on sales shall not be included.
>
> 4. "Tangible personal property" means tangible goods, wares, and merchandise, and gas, electricity, and water when furnished or delivered to consumers or users within this state.
>
> 5. "Retailer" means and includes every person engaged in the business of selling tangible personal property for use within the meaning of this chapter; provided, however, that when in the opinion of the director it is necessary for the efficient administration of this chapter to regard any salesmen, representatives, truckers, peddlers, or canvassers as the agents of the dealers, distribu-

tors, supervisors, employers, or persons under whom they operate or from whom they obtain the tangible personal property sold by them, irrespective of whether they are making sales on their own behalf or on behalf of such dealers, distributors, supervisors, employers, or persons, the director may so regard them and may regard the dealers, distributors, supervisors, employers, or persons as retailers for purposes of this chapter.

6. "Retailer maintaining a place of business in this state" or any like term, shall mean and include any retailer having or maintaining within this state, directly or by a subsidiary, an office, distribution house, sales house, warehouse, or other place of business, or any agent operating within this state under the authority of the retailer or its subsidiary, irrespective of whether such place of business or agent is located here permanently or temporarily, or whether such retailer or subsidiary is admitted to do business within this state pursuant to chapter 494. * * *

Code of Iowa, § 423.2 (1983) provides:

Imposition of tax. An excise tax is hereby imposed on the use in this state of tangible personal property purchased for use in this state, at the rate of three percent of the purchase price of such property. * * *

Code of Iowa, § 423.6 (1983) provides:

How collected. The tax herein imposed shall be collected in the following manner:

* * *

2. The tax upon the use of all tangible personal property other than that enumerated in subsection 1 hereof, which is sold by a retailer maintaining a place of business in this state, or by such other retailer as the director shall authorize pursuant to section 423.10, shall be collected by such retailer

and remitted to the department pursuant to the provisions of sections 423.9 to 423.13.

* * *

Code of Iowa, § 423.9 (1983) provides:

Collection by retailer. Every retailer maintaining a place of business in this state and making sales of tangible personal property for use in this state, not exempted under the provisions of section 423.4 nor collectible under the provisions of section 423.7, shall at the time of making such sales, whether within or without the state, collect the tax imposed by this chapter from the purchaser, and give to the purchaser a receipt therefor in the manner and form prescribed by the director, if the director shall, by regulation, require such receipt. Each such retailer shall list with the department the name and address of all his agents operating in this state, and the location of any and all his distribution or sales houses or offices or other places of business in this state.

Every person rendering, furnishing, or performing services enumerated in section 422.43, maintaining a place of business in this state shall be subject to the provisions of the preceding paragraph.